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this Memorandum Decision shall not be
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**IN THE
COURT OF APPEALS OF INDIANA**

DELL COMPUTER HOME SYSTEMS,

Appellant,

vs.

KWEKU K. BENTIL,

Appellee.

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No. 49A05-0604-CV-196

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patrick L. McCarty, Judge
Cause No. 49D03-0506-PL-21683

February 23, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Dell Computer Home Systems (“Dell”) appeals the trial court’s grant of the motion by Kweku K. Bentil for summary judgment and its order that Dell pay Bentil \$2,989.00.

We reverse.

ISSUE

Whether the trial court erred in granting Bentil’s motion for summary judgment.

FACTS

On December 30, 2004, Bentil filed a notice of claim with the Marion County/Center Township Small Claims Court. Bentil alleged that Dell was indebted to him in the amount of \$2,989.00 because he had paid \$989 in November 2003 for a computer, monitor, printer, digital camera and \$100 rebate, and Dell “shipped only the computer and monitor and ha[d] refused to ship the printer and digital camera after one year and seven phone calls.” (Dell’s App. 1). Trial before the Small Claims Court was held on March 30, 2005. According to the order of that court, Bentil “appeared in person and [Dell] by counsel”; Bentil “presented his case-in chief”; and Dell’s counsel moved for judgment on the evidence. (Dell’s App. 3). The Small Claims Court granted Dell’s motion on March 30, 2005. *Id.*

On June 6, 2005, Bentil filed an appeal of the Small Claims Court’s judgment in Marion County Superior Court (“the trial court”), and the trial court ordered Bentil to

replead his complaint.¹ On July 1, 2005, Bentil filed with the trial court his repleaded “Complaint for Breach of Contract, Intention to Defraud and Fraud” against Dell.² (Dell’s App. 7). The complaint asked that the purchase agreement be rescinded; that Bentil recover the full cost of the computer system; and that he be awarded “the damages available under the Law” and “his costs and disbursements” and “other relief . . . including punitive damages.” (Dell’s App. 12). Dell’s counsel filed an appearance and an answer for Dell on July 29, 2005. In its answer, Dell denied the allegations of Bentil’s complaint that it had breached the contract with Bentil “by failing to fulfill its promise to deliver all the items included in the system purchased and paid for by [Bentil]”; denied that it had “unlawfully made [Bentil] pay in full and in advance for said computer system in advance with intention to make only a partial shipment to” him; denied that it had “intentionally adopted an accounting format to make it appear that the all-in-one printer and the digital camera have no dollar value and to perpetuate fraud on [Bentil]”; and denied that it had “intentionally misled [him] as to the expectations of the system purchased” (App. 11).

On November 16, 2005, Bentil filed his “Motion for Default Judgment and Summary Judgment.” (Dell’s App. 17). No designated evidence was submitted with the motion, and the motion did not contain a certification by Bentil, acting *pro se*, that he had

¹ Rule 81.1C of the Marion Circuit and Superior Court Civil Division provides that a party may appeal from the judgment of a Marion County Small Claims Court to the Marion Superior Court within sixty days from the entry. When proceeding with such an appeal in the Marion Superior Court, the party must “replead[] his complaint in accordance with the Indiana Rules of Trial Procedure.” *Id.*

² Bentil’s repleaded complaint did not include any written documentation upon which he alleged that the contract with Dell was premised. *See* Ind. Trial Rule 9.2.

served the motion on counsel for Dell. The trial court set Bentil's "motion for summary judgment . . . for oral argument on February 28, 2006," and sent notice to Dell's counsel. (Dell's App. 5).

Bentil appeared for the February 28, 2006, hearing, but Dell failed to appear.³ The trial court's record shows that it never placed Bentil under oath. The trial court asked Bentil to "tell [it] what this is about." (Tr. 1). Bentil described his initial order, that he had paid \$989, and that he had never received the digital camera or "all-in-one printer" but had received his \$100 rebate. (Tr. 2). Bentil then asked "the Court to award enough to compensate for the money [he'd] lost and costs," noting that he had moved to Miami and had "spent money in Small Claims Court, coming back and forth," and further asked "the cost of the camera and the printer, and then filing fees." (Tr. 3, 5). Bentil "also ask[ed] for punitive damages." (Tr. 5).

After taking the matter under advisement, on March 9, 2005, the trial court issued its order, stating that "having considered the sworn testimony and submissions," Bentil's motion for summary judgment was granted. (Dell's App. 45). It then ordered Bentil to return the products he had received from Dell, and ordered Dell to pay Bentil "\$2,989.00, which sum represents a full refund for the cost of the computer system, plus litigation costs, out-of-pocket expenses, and punitive damages." *Id.*

³ According to Dell's brief, its counsel failed to attend the hearing "through an unfortunate, and unintentional, calendar failure" and had sought, unsuccessfully, on the day of the hearing to reschedule it. Dell's Br. at 3. The CCS does not reflect this information; nor is it evidenced in the Appendix. Hence, we do not consider it.

Dell appeals,⁴ arguing that summary judgment was erroneously granted. It also argues that no evidence supports the trial court's award of compensatory damages or of punitive damages, and that the punitive damages are erroneous as a matter of law. We find Dell's first argument dispositive.

DECISION

When reviewing a grant of summary judgment, we apply a well-settled standard of review. *U-Haul Intern., Inc. v. Nulls Machine and Mfg. Shop*, 736 N.E.2d 271, 274 (Ind. Ct. App. 2000). Summary judgment is appropriate if the "designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Ind. Trial Rule 56(C) (emphasis added). The moving party bears the burden of specifically designating materials that make a prima facie showing that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *U-Haul*, 736 N.E.2d at 274, (citing *Interstate Cold Storage, Inc. v. General Motors Corp.*, 720 N.E.2d 727 (Ind. Ct. App. 1999)) (emphasis added). If these two requirements are met, the burden shifts to the nonmovant to set forth designated facts showing the existence of a genuine issue for trial. *Id.* (emphasis added).

As noted earlier, Bentil submitted no evidentiary material with his motion for summary judgment. For the purpose of supporting the movant's motion for summary

⁴ We direct Dell's counsel to the proper use of "Appellant" and "Appellee." The "appellant" is "the party who appeals a lower court's decision." BLACK'S LAW DICTIONARY 187 (8th ed. 2004). The "appellee" is the "party against whom an appeal is taken, and whose role is to respond to that appeal." *Id.* at 108. Thus, Dell is the appellant and Bentil is the appellee.

judgment, the trial court may not rely on a party's brief. *Marathon Petroleum Co. v. Colonial Motel Properties, Inc.*, 550 N.E.2d 778, 781 (Ind. Ct. App. 1990). Rather, the trial court is constrained to rely on the pleadings, depositions, answers to interrogatories, admissions on file, affidavits, and testimony. *Id.* Of these permissible options, the trial court here had only the pleadings of the parties: Bentil's complaint and Dell's answer.

Bentil argues on appeal that he presented evidence to the trial court, and he cites the trial court's order in that regard. However, we have before us the trial court transcript, which reflects that Bentil was not sworn under oath to tell the truth.⁵ His statements merely followed the trial court's request that he explain "what this is about." (Tr. 1). Further, according to the CCS, the hearing was set "for oral argument" on Bentil's motion and not for trial. (Dell's App. 5). The unsworn commentary of counsel at a hearing on a summary judgment motion "does not comply with" Trial Rule 56(C) as admissible evidence under the Rule. *Freson v. Combs*, 433 N.E.2d 55, 59 (Ind. Ct. App. 1982).

In addition, Rule 81.1(C) of the Marion Circuit and Superior Court Civil Division Rules requires that to appeal the judgment of the Small Claims Court,

the Small Claims Court judge *shall* certify a completed transcript of all the proceedings had before said judge and transmit the same, together with all other papers in the Cause, to the Marion County Clerk,

No such certified transcript of the March 30, 2005, trial held on Bentil's complaint was ever transmitted by the Small Claims Court to the trial court. Thus, the trial court not

⁵ Nor were any exhibits offered or admitted into evidence.

only lacked any evidentiary submission by Bentil in support of his motion but also was without the transcript of the Small Claims Court trial at which Bentil had “presented his case-in-chief.” (Dell’s App. 3).

A summary judgment without permissible evidentiary support, *i.e.*, “minus affidavits and other supporting documents” is, in reality, a judgment on the pleadings. *Davidson v. Cincinnati Ins. Co.*, 572 N.E.2d 502, 505 (Ind. Ct. App. 1995) (citing WILLIAM HARVEY, 1 INDIANA PRACTICE, § 12(C) at 593 (1987)), *trans. denied*. A judgment on the pleadings is proper only when there are no genuine issues of material fact and when the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations therein. *Eskew v. Cornett*, 744 N.E.2d 954, 857 (Ind. Ct. App. 2001), *trans. denied*. We review *de novo* the trial court’s decision on a motion for judgment on the pleadings. *Id.* We accept as true the well-pleaded material facts alleged, and we will not affirm if there are any genuine issues of material fact. *Id.* The moving party is deemed to have admitted well-pleaded facts in favor of the nonmovant, and this court will draw all reasonable inferences in favor of the nonmovant. *Id.* Dell’s answer denied the allegations of Bentil’s complaint. Therefore, the pleadings do not establish that there are no genuine issues of fact and that Dell cannot in any way succeed. *Id.*

Reversed.

BAKER, J., and ROBB, J., concur.